Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVEN J. DELLA ROSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the hearsay rule may be used to prevent the Defendant from introducing evidence that tends to show a prosecution witness rather than the Defendant committed the crime charged or that contradicts incriminatory testimony by a Government Rule 404(b) witness?

Whether the Seventh Circuit's *Paladino* review process, which returns to the District Court cases that were sentenced prior to *Booker* for the limited purpose of obtaining a statement from the District Judge whether he would have imposed the same sentence had he known the sentencing guidelines were advisory, comports with constitutional principles where the Court does not require the District Court to hear new evidence but allows it to rely on the evidence at the pre-*Booker* sentencing hearing, when the Defendant at that time did not have a reason to present the kinds of mitigating evidence that he might present post-*Booker*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Steven Della Rose, prays that a writ of certiorari be issued to review the decision of the Seventh Circuit Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinions of the Court of Appeals are reported at 403 F.3d 891 and 435 F.3d 735, which are attached as Exhibits A and B.

JURISDICTION

The Court of Appeals affirmed the Defendant's convictions on April 5, 2005. The Court of Appeals retained jurisdiction and remanded the case for the limited purpose of learning whether the District Court would have imposed the same sentence under *United States v. Booker*, 125 S.Ct. 738 (2005). After receiving that answer the Seventh Circuit affirmed the sentence and entered judgment on January 25, 2006. The Defendant filed a Petition for Rehearing that was denied on February 23, 2006. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Point 1.

The Government charged and convicted Steven Della Rose, an attorney, for conspiracy to commit mail fraud under 18 U.S.C. §1341. It alleged that he settled a client's worker's compensation case for $80,000 but then stole the client's portion of the settlement, which came to $64,000. Allegedly he arranged for a confederate, Dennis Ilenfeld,

who worked out of his law office, to obtain a fake Illinois identification card in the client's name. Ilenfeld used the fake identification card to cash the settlement check, after which he gave Della Rose the proceeds. Ilenfeld later pled guilty and became the principal witness against Della Rose.

Della Rose denied stealing the proceeds. In his defense he argued that Ilenfeld obtained the fake identification card on his own and engineered the scheme.

In its case in chief the government called Richard Britz, who testified pursuant to Federal Rule of Evidence 404(b) that Della Rose had once obtained a fake identification card for him. Della Rose tried to counter by calling Frank DeFrancesco, who was prepared to testify that he had spoken to Richard Britz, and Britz told him that he actually got the fake identification card from a person named "Dennis." DeFrancesco called Dennis who quoted a high fee. The District Court would not allow the testimony and the Court of Appeals affirmed, considering the evidence to be hearsay.

The ruling by the lower courts prevented the Defendant from presenting substantial exculpatory evidence on his behalf. The Government accused Defendant of committing this crime through the employment of a fake identification card. To prove Defendant's guilt it presented Rule 404(b) evidence showing that the Defendant knew how to obtain fake identification cards, as evinced by the fact that he had done it in the past with Britz. DeFrancesco, however, was prepared to testify that Britz told him, in effect, that he did *not* get the fake identification card from the Defendant, he got it from someone named "Dennis" at Defendant's office, a logical reference to Ilenfeld. The lower

courts mechanistically applied the hearsay rule to deprive Della Rose of this reliable exculpatory evidence.

Point 2.

Since the Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), the Seventh Circuit has been remanding cases that were on appeal when *Booker* was decided and asking the District Court whether it would have imposed the same sentence knowing that the guidelines were advisory. If the Judge says yes, the Seventh Circuit then applies a *Booker* reasonableness review. If the Judge says no, the Seventh Circuit finds plain error and remands the case for resentencing. *See United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

In processing this remand, however, the District Court is not required to hear additional evidence. In the instant case the Defendant presented some additional arguments and asked the District Court for a hearing where he could present evidence that he did not present at the original sentencing, because pre-*Booker* there was no practical reason to present the kinds of mitigating evidence relevant post-*Booker*. The District Court denied the request and stated in a one sentence order that he would have imposed the same sentence. The Seventh Circuit affirmed.

The process by which the Seventh Circuit determines plain error for *Booker* pipeline cases is flawed. *Booker* applies to cases on direct appeal, but in the Seventh Circuit defendants do not get the benefit of that decision because they can be limited to a review of the evidence presented back when the Defendant had no reason to present any mitigating evidence at all. Thus, the Seventh

Circuit denies defendants who were sentenced prior to *Booker* the full benefit of that decision.

REASONS FOR GRANTING THE WRIT

The Court Should Grant the Writ in Order to Determine The Extent to Which the Hearsay Rule May be used to Prevent a Defendant from Introducing Evidence that Tends to Show a Prosecution Witness rather than the Defendant Committed the Crime Charged or that Contradicts Incriminatory Testimony by a Government Rule 404(b) Witness?

The Seventh Circuit in this case effectively held that the evidentiary hearsay rule trumps the introduction of evidence that would be exculpatory for the defendant, in direct contradiction to *Chambers v. Mississippi*, 410 U.S. 284 (1973), which held that an evidentiary rule should not be permitted to exclude reliable evidence that is favorable to the Defendant. The Court should review this case in order to reaffirm the principles of *Chambers*, which has been chipped away recently by decisions not related to the question of guilt or innocence.

The defendant, a lawyer, allegedly stole settlement money from his client. The Government's principal witness was Dennis Ilenfeld, a co-defendant who had pled guilty. Ilenfeld testified that the Defendant had arranged for him (Ilenfeld) to obtain a fake identification card in the name of the client through someone at the office of the Illinois Secretary of State. Ilenfeld later used that fake identification card to cash the client's settlement check. Ilenfeld testified that he gave the proceeds to the Defendant. Defendant's defense was that Dennis Ilenfeld was in fact

the true culprit in the scheme, which had been perpetrated without Defendant's involvement.

In its case-in-chief the Government called Richard Britz, who it would later describe to the jury as a "a very important witness." Britz testified that Defendant had previously obtained a fake identification for him. The Defendant wanted to call Frank DeFrancesco to testify that Britz told him (DeFrancesco) that he had actually obtained that fake identification card from someone named "Dennis."

As the Seventh Circuit noted, DeFrancesco's testimony would have impeached the statement by Britz that the Defendant had obtained a fake identification card for him. "Britz's testimony was that he obtained the false identification from [the Secretary of State] through Della Rose. DeFrancesco's testimony would have squarely contradicted Britz on this point." In addition, the Court noted that "DeFrancesco's testimony would have supplied the jury with some basis to believe that Ilenfeld, rather than Della Rose, may have been the perpetrator of the scheme." Yet, the Seventh Circuit upheld the District Court's denial of this testimony because "the relevance of DeFrancesco's testimony was not enough to circumvent the obvious hearsay problem." *Della Rose*, 403 F.32d at 901-03; App. 16-18.

In *Chambers*, the defendant called a witness who had confessed to the crime. On cross-examination by the State the witness repudiated the confession and asserted an alibi. The judge then excluded as hearsay the testimony of three other witnesses called by the defendant to say that the witness had in fact made confessions to them shortly after the offense. This Court held that using the

state evidentiary hearsay rule to prevent the defendant from introducing this testimony deprived the defendant of due process as guaranteed by the Fifth Amendment.

A similar violation occurred here. Britz, the "very important witness," told the jury that he obtained a fake identification card from Defendant; yet, outside the jury Britz apparently told DeFrancesco that he obtained the fake identification card from someone named "Dennis." The Seventh Circuit understood the significance of this testimony but considered it trumped by the hearsay rule.

To suggest that Britz can go ahead and tell the jury one thing (that Della Rose arranged to get me a fake identification card) and tell DeFrancesco something else (that Ilenfeld arranged to get me a fake identification card), but exclude the latter testimony because it is hearsay, absolutely denied Defendant due process of law.

Following *Chambers* this Court has held that a defendant is entitled to a meaningful opportunity to present a meaningful defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984). Prohibiting competent reliable evidence based on an evidentiary rule deprives the defendant an opportunity to test the government's case meaningfully. *United States v. Scheffer*, 523 U.S. 303, 330 (1998). *See also Crane v. Kentucky*, 476 U.S. 683 (1986).

In *Green v. Georgia*, 442 U.S. 95 (1979), this Court followed *Chambers* in a case where the state hearsay rule was used to prevent the defendant from presenting exculpatory evidence at sentencing. More recently, however, in *Oregon v. Guzek*, 126 S.Ct. 1226 (2006), this Court limited *Green*, stating that the case did not mean to imply that the defendant had a constitutional right to present "residual doubt" evidence, *i.e.*, evidence going to guilt or innocence,

at the sentencing phase. The instant case presents an opportunity to clarify these principles in light of *Guzek*, to insure that lower courts do not distort the holding in *Guzek* into some sort of rejection of the holding in *Chambers*.

Thus, this Court should review this case to define the parameters in which evidentiary rules may be used to prevent a Defendant from presenting exculpatory evidence. It is important for the Court to paint the line clearly that divides the kinds of evidence that fall under *Chambers* and the kinds of evidence that fall under *Guzek*.

II.

Whether the Seventh Circuit's *Paladino* Review Process, Which Returns to the District Court Cases that were Sentenced Prior to *Booker* for the Limited Purpose of Obtaining a Statement from the District Judge Whether He Would have Imposed the Same Sentence had he Known the Sentencing Guidelines were Advisory, Comports with Constitutional Principles where the Court does not Require the District Court to Hear New Evidence but Allows it to Rely on the Evidence at the pre-*Booker* Sentencing Hearing, when the Defendant at that time Did Not Have a Reason to Present the Kinds of Mitigating Evidence that He Might Present post-*Booker*?

In the wake of *United States v. Booker*, 125 S.Ct. 738 (2005), the Seventh Circuit decided *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). *Paladino* sets forth the process to be followed in the Seventh Circuit for defendants whose cases were on appeal when this Court decided *Booker* and had therefore been sentenced under the now discredited mandatory guideline scheme. Specifically, while